Selecting Pennsylvania Judges in the Twenty-First Century

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Appointing judges for life was a late seventeenth century English idea, crafted to protect the judiciary of noble status from domination by royalty. Since 1840, no entity that has composed and ratified a constitution has adopted that practice. Electing judges was an idea of nineteenth century Americans who believed in the right to self-government and who sought to protect their judges from domination by sordid politicians. Merit selection of judges, subject to periodic retention elections, was an idea of early twentieth century Americans who believed that law is a science or an arcane technology unrelated to politics and properly entrusted to experts. Many Americans in the twenty-first century have their doubts about the virtues of self-government, and no one believes that law in America is an apolitical technology that can be entrusted to elite experts.

Contested judicial elections, whatever their utility in the nineteenth century, are no longer defensible if political campaigns are marked by costly television advertising that requires contestants to raise and spend enormous sums of money to secure or hold judicial office. The defensibility of contested judicial elections shrinks further when those costly means of campaigning are made almost immune to legal restraint as a result of extravagant interpretations of the First Amendment made by the Supreme Court, interpretations that protect the right to attack anonymously the integrity of candidates.[1]

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1. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-57 (1995) (holding that a state statute that prohibited the distribution of anonymous campaign literature violated the free speech provisions of the First Amendment); Owen G. Abbe &

Merit selection, whatever its virtues in the first half of the twentieth century, is likewise no longer defensible when judges and courts all over the nation daily make "impact decisions" of the most overt political nature. While the American and Pennsylvania Bar Associations have long favored merit selection,[2] insufficient public support from voters presents an insurmountable obstacle to its adoption.[3] It is also a problem that periodic retention elections have proven, in recent times, to invite costly electronic assaults on politically defenseless sitting judges.

It is therefore time to try to rethink the problem and revise the Constitution of Pennsylvania. To find a solution appropriate to our times, we need to lay aside both the idea that the courts can be entrusted to wholly independent lawyer-experts and the idea that political campaigns for judicial office are a constructive method of selecting judges. Although it is essential to give the legal profession an opportunity to influence the selection process, it may be equally essential to allow voters a role sufficient to reassure citizens that the courts belong to them and to remind sitting judges that they govern with the consent of their fellow citizens, not by anointment.

It helps in thinking about judicial selection to sort out the judges by their different roles. Common Pleas Court judges, the trial judges for most cases,[4] are the most important because they have the most direct

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Paul S. Harrison, *How Judicial Election Campaigns Have Changed*, 85 JUDICATURE 286 (2002).

2. *See, e.g.*, Jeff Blumenthal, *ABA House of Delegates Endorses Public Funding of Judicial Elections*, LEGAL INTELLIGENCER, Feb. 6, 2002, at 1 (describing how Pennsylvania delegates to the American Bar Association's House of Delegates would only support a resolution endorsing public financing of judicial elections after an amendment was added stating that the ABA still preferred merit selection to judicial elections); John L. Kennedy, *PBA Sets Judicial Campaign Guidelines*, PA. L. WEEKLY, Dec. 5, 1994, at 1 (reporting that the president of the Pennsylvania Bar Association stated that his organization supports merit selection or gubernatorial appointment of judges over a popular election-based system).

3. *See, e.g.*, Philip L. Dubois, *Voter Responses to Court Reform: Merit Judicial Selection on the Ballot*, 73 JUDICATURE 238, 240-41 (1990) (noting that, in 1969, Pennsylvania voters rejected a proposed merit selection system for the state); Alexandra Makosky, Comment, *The King's Bench Power in Pennsylvania: A Unique Power That Provides Efficient Results*, 101 DICK. L. REV. 671, 680 n.61 (1997) (discussing a 1995 study that found that only thirty-five percent of Pennsylvania lawmakers supported a merit selection system). The lack of popular support for merit selection is not solely a Pennsylvania phenomenon. In 1987, the voters of Ohio rejected merit selection for state judges by a two-to-one margin. *E.g.*, T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, PLAIN DEALER (Cleveland), Feb. 15, 2000, at 1A.

4. Of course, the special courts, which "constitute the 'grass roots' level" of the Pennsylvania Court system, have original jurisdiction over specifically designated matters. ADMIN. OFFICE OF PA. COURTS, REPORT OF THE ADMINISTRATIVE OFFICE OF THE PENNSYLVANIA SUPREME COURT 1999, at 10-11 (1999). The special courts include the District Justice Courts, the Philadelphia Municipal Court, the Philadelphia Traffic Court, and the Pittsburgh Magistrates Court. *Id.* The Commonwealth Court also has original

impact on individual citizens. They exercise great power and enjoy great discretion. Trial judges are also the hardest to select because their job tests qualities of character that are not ordinarily tested in the practice of law, or any other activity. While their political prejudices may influence their work, trial judges do not make law, and hence their politics are not really very important. To restrain trial judges from inappropriate conduct, the most important institution is appellate review. Additional restraint can also be provided by effective enforcement of sound standards of judicial ethics. Especially for trial judges, who are exposed to so many opportunities to misuse their powers, the enforcement of judicial ethics is an essential feature of a sound legal system.

For these reasons, it would seem that the initial selection of the trial judge should be the responsibility of someone or some group accessible to the organized bar, but not controlled by them. The governor is the most obvious choice, not least because that officer is accountable to the electorate. It is, however, a problem that the governor's constituency is statewide and the trial judges serve local constituencies. Moreover, if the judges are to serve limited terms, a judge so appointed would not only be beholden to the governor for the opportunity to remain in office, but at risk of non-reappointment for reasons having nothing to do with the merits of his or her performance. Accordingly, the judges would lack sufficient independence to forestall political manipulation of the judicial process.

What is needed to select trial judges is a constitutional institution (call it a Commission on the Judiciary) composed of persons appointed by succeeding governors and the leaderships of the Pennsylvania Senate to assure that the group is beholden to no constituency. Perhaps its members might be required to be of an age sufficient to make personal ambition no longer a factor in their judgments, making it more likely that they will be inclined to give proper but not excessive heed to the assessments of lawyers. This Commission might also take on responsibility for the enforcement of the standards of judicial ethics and the evaluation of judicial performance by lawyers and litigants. So far, this thinking tracks that of the advocates of merit selection.

The problem with such a commission as an institution *appointing* judges is that this would disempower the community in which the trial judge sits and may be insufficient to liberate the judges from an unwelcome servitude, or appearance of servitude, to the elite class who put them on the bench. It is for this reason that merit selection is not saleable in our time. Indeed, very few states ever seriously considered

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jurisdiction over certain claims involving the Commonwealth government and government officials. *Id.* at 12.

merit selection of trial judges, apparently for the reason that there was too much political resistance to the idea, especially in rural communities resistant to domination by state governments.

The need for citizen participation might be supplied by a procedure of "voter confirmation," putting the name of the candidate nominated by the Commission before the electorate in the district in which the judge would serve. This would resemble the retention election, but would be conducted before the judge is allowed to sit on a trial. The only court we know to be selected in this way is the Supreme Court of Japan.[5] With a similar device, Utah requires its judges to stand for a retention election in the third year after their appointment.[6] The advantage of holding the popular election at the outset of a judicial career is that the election sends an appropriate signal to both citizens and judges that the judges are servants to their constituents. Also, an initial popular election makes it difficult for an interest group to launch a televised personal attack on the candidate selected by the commission.

To assure some integrity to voter confirmation, the Commission should be expected to publicize prospective nominations for comment and then to circulate a guide making the case for its nominations, including explanations of any endorsements and any protests it may have considered. It should also be prepared to defend its nominees against electronic attack by political interest groups of whatever stripe.

After an initial term of six or eight years in which a judge can demonstrate the personal qualities needed to perform the work of a trial judge, the commission might be expected to make a recommendation as to whether the judge should be retained for an additional period. That decision, too, would be put before the electorate for confirmation. Reconfirmation might be for a longer term, so that the two terms together might constitute, for most judges, a full judicial career.

Pennsylvania Superior and Commonwealth Court judges entertaining appeals of right have front-line responsibility for restraining maverick Common Pleas Court judges. Appellate judge is a very different job from that of the trial judge. It requires close attention to the details of the record of the proceedings below and to laws and legal precedent cited by counsel. Many such judges, having learned in school that appellate judges make law, presume that they, too, should make some law by writing learned opinions on unsettled points of law. But in reality it is hardly so for the Superior and Commonwealth Courts, because anything they write of significance to anyone other than the

5. KENPŌ, art. 79, *reprinted in* 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 20 (Albert P. Blaustein & Gisbert H. Flantz eds., 1990).

6. UTAH CONST. art. VIII, § 9.

parties will be subject to possible review by the Pennsylvania Supreme Court. Hence, their qualifications to make law are of minimal importance in their selection. The qualities most needed in intermediate court judges is that they must be attentive to lawyers and to the conduct of the trial court and faithful to the guidance of the Supreme Court. What is needed therefore is a process for selecting Superior and Commonwealth Court judges that will reinforce those traits. The need for adherence to the guidance of the higher court suggests that they should be selected by that court. Selection by the Supreme Court would make clear where the ultimate responsibility for judicial lawmaking should lie. But the Supreme Court might be limited in its selection by requiring prior experience as a trial judge as a condition to the nomination. This requirement would link the Court of Appeals judges to the institutions both below and above them in the structural hierarchy and reinforce a correct sense of what their roles are, strengthening the pyramid image already used to represent Pennsylvania's Unified Judicial System.[7]

Because of the nature of their work, there is very little to be said in favor of voters confirming or reconfirming the selection of intermediate appellate court judges. There is little political content to their work. It is in no one's interest for such judges to be seeking the approval of some group outside the judiciary. And their work is all but invisible, not merely to the electorate, but even to the profession. Voter confirmation should therefore not apply to them. Their terms might be as brief as six years and renewable, or much longer if they were subject to removal by a supermajority of the Supreme Court when its members have lost confidence in an individual judge.

In contrast, it is clear to all that justices of the Supreme Court of Pennsylvania hold political office. Moreover, no one today would question the dictum of John Stuart Mill:

> The disposition of mankind, whether as rulers or fellow-citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power.[8]

While restraints are needed, they are not easily fashioned. Citizens and lawyers may unite in the conviction that sitting Supreme Court justices should be independent from the influences of interest group politics, but it is not obvious that a satisfactory alternative can be devised.

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7. *E.g.*, ADMIN. OFFICE OF PA. COURTS, *supra* note 4, at 9.

8. JOHN STUART MILL, ON LIBERTY 28 (1885), *quoted in* Furman v. Georgia, 408 U.S. 238, 467 (1971) (Rehnquist, J., dissenting).

The voter confirmation process suggested for trial judges might in some respects seem to be a reasonably agreeable method, except that the Commission nominating trial judges should aspire to be as apolitical as circumstances permit in nominating trial judges. That aspiration will not work for the selection of Supreme Court justices. Given the political importance of their roles, there must be a political forum in which interest groups can compete for the selection of high court justices whose politics they prefer. The Commission should not be that kind of forum.

We conclude that the best method of selecting Supreme Court justices is appointment by the Governor with the assent of a supermajority of the Senate. The supermajority requirement would prevent the appointment of persons known to be partisans of marginal political views that they might be tempted to impose on the people. Because governors and senators are themselves politically accountable to the people to be served if they seat a bad justice, the case for voter confirmation as an additional requirement is less strong. It would, however, serve to emphasize that the justices are not solely indebted for their power and status to partisan politicians, but also owe their power to all the people.

To assure their independence, the terms of appointment of Supreme Court justices should be substantially lengthened. In New York, it is fourteen years,[9] in the District of Columbia fifteen.[10] The purpose of such long terms is to diminish the vulnerability of sitting justices to manipulation by interest group politics. The risks associated with longer terms are much less with respect to high court judges because they exercise very little power as individuals. Longer terms lend stability to the institution and coherence to judge-made law. A fifteen-year term would generally be a career, for it would be a rare judge who would seek to be reappointed after serving such a term. Interest group pressure could be mounted on those looking for reappointment. If that is a concern, it could be prevented by restricting the justices to a single term.

By facing separately the problems of selecting Common Pleas Court judges, Commonwealth and Superior Court judges, and Supreme Court justices, this scheme seeks to employ selection methods that are shaped by the different roles to be performed by different kinds of judges. Because the long terms of Supreme Court justices would make them virtually invulnerable to interest group politics, the judiciary as a whole would be assured almost complete political independence. Yet, if the

9. N.Y. CONST. art. VI, § 2(a).

10. D.C. CODE ANN. § 11.1502 (2001) (stating that all judges in the District of Columbia court system shall serve for terms of fifteen years, with a mandatory retirement age of seventy-four).

court wandered too far from the conventional understandings, later appointees might be expected to restore its balance. The trial judges would know that their jurisdiction derived from a vote of the people, and the Superior and Commonwealth Court judges would know that, although they are independent of all politics, they are not independent of the law.

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